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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TOBY MCADAM,  
d/b/a RISINGSUN HERBAL  
HEALTH CORP.,  
d/b/a RISINGSUN HEALTH,  
d/b/a RISINGSUN  
NUTRITIONAL CORP.  
d/b/a RISINGSUN  
MINISTRIES,  
d/b/a NUTRITIONAL  
SUPPLEMENTS, INC.  
d/b/a MCADAM HEALTH  
ENTERPRISES CORP.

Defendant.

Cause No. CR 15-118-BLG-SPW

**DEFENDANT'S BRIEF IN SUPPORT OF UNOPPOSED MOTION TO  
PROCEED TO SENTENCING IMMEDIATELY FOLLOWING CHANGE  
OF PLEA**

Pursuant to the provisions of Local Rule CR 47.2, Toby McAdam  
(McAdam), by and through his attorney, Brian P. Fay of Angel, Coil & Bartlett,  
Attorneys at Law, hereby respectfully submits this Memorandum in Support of  
Defendant, Toby McAdam's, Unopposed Motion to Proceed to Sentencing

1 Immediately Following Change of Plea.

## 2 **I. INTRODUCTION**

3 On Tuesday, December 1, 2015, McAdam intends to plead guilty to Count I  
4 of the Amended Information. Count I of the Amended Information charges  
5 McAdam with violating 18 U.S.C. §401(3), for disobeying the provisions of a  
6 Consent Decree entered into by the parties on November 5, 2010 and a December  
7 4, 2013 Order of Civil Contempt. The parties have entered into a Plea Agreement  
8 which will be filed with the Court on December 1, 2015, as, at this point in time, it  
9 has only been signed by McAdam and the undersigned.

10 Federal Rule of Criminal Procedure 32(c) provides:

### 11 **(c) Presentence Investigation.**

#### 12 **(1) Required Investigation.**

13 **(A) In General.** The probation officer must conduct a  
14 presentence investigation and submit a report to the court  
15 before it imposes sentence unless: ....

16 (ii) the court finds that the information in the record enables  
17 it to meaningfully exercise its sentencing authority under  
18 18 U.S.C. §3553, and the court explains its finding on the record.

## 19 **II. ARGUMENT**

20 The Sentencing Guidelines are now, of course, advisory. See *United States*  
21 *v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Thus, although  
22 the recommended Guideline range must be taken into account, this Court must  
23 follow the “parsimony provision” of 18 U.S.C. § 3553(a), which is the  
24 “overarching” command of the statute. *Kimbrough v. United States*, 552 U.S. 85,  
25 128 S.Ct. 558, 570, 169 L.Ed.2d 481 (2007). That provision provides: “[t]he court  
26 shall impose a sentence sufficient, but not greater than necessary, to comply with  
27 the purposes set forth in paragraph (2) of this subsection.” 18 U.S.C. § 3553(a).

28 Those purposes, set forth in paragraph 2, are: “the need for the sentence  
imposed A) to reflect the seriousness of the offense, to promote respect for the  
law, and to provide just punishment for the offense; B) to afford adequate  
deterrence to criminal conduct; C) to protect the public from further crimes of the

1 defendant; and D) to provide the defendant with needed educational or vocational  
2 training, medical care, or other correctional treatment in the most effective  
3 manner.” 18 U.S.C. § 3553(a)(2).

4 In making this determination the Court must consider the nature and  
5 circumstances of the offense, the history and characteristics of the defendant, the  
6 kinds of sentences available, the Guideline range and any comments thereto, the  
7 need to avoid unwarranted sentence disparities, and the need to provide restitution  
8 to any victims. 18 U.S.C. § 3553(a).

9 **A. Sentencing Guidelines.**

10 U.S.S.G. §2J1.1 is the applicable guideline for a violation of 18 U.S.C.  
11 §401. See U.S.S.G. Appendix A. Section 2J1.1 requires the application of  
12 U.S.S.G. §2X5.1. Section 2X5.1 provides in pertinent part that “[i]f there is not a  
13 sufficiently analogous guideline, the provisions of 18 U.S.C. §3553 shall  
14 control...” McAdam believes that there is not a sufficiently analogous guideline  
15 and, therefore, believes it is appropriate for the Court to sentence him in  
16 accordance with the §3553(a) sentencing factors.

17 **B. Nature and Circumstances of Offense.**

18 The Amended Information charges McAdam with eight counts of violating  
19 the Consent Decree and the Civil Order of Contempt. McAdam will plead guilty  
20 to Count I and the remaining seven counts will be dismissed pursuant to the terms  
21 of the plea agreement . A review of the discovery provided in this case leaves the  
22 undersigned convinced that, if put to its burden, the government could prove  
23 multiple instances where McAdam has violated the terms and conditions of the  
24 Consent Decree and the Civil Order of Contempt. See Amended Information.

25 On multiple occasions, McAdam sold Lugol’s Iodine and Bloodroot  
26 Immune Nutritional Support in violation of the Consent Decree and the Civil  
27 Order of Contempt. However, there is no indication that any of the purchasers  
28 were harmed or otherwise experienced deleterious effects from these products.

**C. History and Characteristics of McAdam.**

McAdam is a 56 year old man who comes before the Court for sentencing for violating 18 U.S.C. §401(3). He is a lifelong resident of Montana. He graduated from high school in 1977 and from Dickinson College in 1981. He has a son, Christopher James, who lives in Willow Creek, Montana and a daughter, Geolyn, who lives in British Columbia. He and his wife, Cheryl, divorced in 1987. He has not remarried. He has no drug or alcohol issues. He has spent most of the last twenty years in the health supplement and alternative health fields.

McAdam is not in good health. He suffers from sleep apnea, a herniated disc, multiple sclerosis, acid reflux and possibly lung cancer. He takes ambien as a sleep aid and hydrocodone for back pain. He also takes medication for acid reflux.

The undersigned does not believe that McAdam scores any criminal history points. However, he does have a past criminal history as follows:

1991: misdemeanor bad checks, Gallatin County, convicted, 90 day suspended sentence;

1991: felony bad checks, Fergus County, 2 year deferred imposition of sentence which was revoked, subsequently sentenced to 6 years MSP;

1992: Criminal Contempt, Fergus County, 5 days in jail (failure to pay fines/restitution);

1992: Criminal Contempt, Lewistown City Court, no jail;

1994: PFMA, Billings Municipal Court, 6 months suspended plus fines;

1998: misdemeanor bad check, Park County, no jail time, fined;

2000: misdemeanor bad check, Park County, no jail time, fined;

2000: misdemeanor bad check, Laurel City Court, 6 months in jail with all but 10 days suspended, fined.

In a telephone conference on Wednesday, November 25, 2015, the undersigned was informed by probation officer Eric Bueller that McAdam has

1 complied with the terms and conditions of his release.

2 **D. The Plea Agreement and Section 3553(a) Sentencing Factors.**

3 Paragraph 2 of the Plea Agreement calls for restitution. McAdam believes  
4 that the government is entitled to restitution in the amount of \$34.50 for the  
5 undercover purchase of Bloodroot Immune Nutritional Support on or about April  
6 22, 2015, and in the amount of \$24.45 for the undercover purchase of Lugol's  
7 Iodine on January 29, 2014.

8 Paragraph 10 of the Plea Agreement call for a joint recommendation by the  
9 parties for a sentence of four months incarceration.

10 These salient provisions of the Plea Agreement adequately reflect the  
11 seriousness of the offense, promote respect for the law, provide just punishment  
12 for the offense, afford adequate deterrence to criminal conduct and protect the  
13 public from further crimes of the defendant.

14 This Plea Agreement is the product of an arms length negotiation following  
15 full disclosure by the government in accordance with the provisions of  
16 Fed.R.Crim.P. 16. Accordingly, the parties believe that provisions of the Plea  
17 Agreement are sufficient, but not greater than necessary to comply with the section  
18 3553(a) sentencing factors. Accordingly, McAdam believes that the Court should  
19 proceed immediately to sentencing following his Change of Plea Hearing on  
20 Tuesday, December 1, 2015.

21 Respectfully submitted this 27<sup>th</sup> day of November, 2015.

22 Angel, Coil & Bartlett

23  
24 /s/ Brian P. Fay  
25 Brian P. Fay  
26 Attorney for Defendant  
27 Toby McAdam  
28

**CERTIFICATE OF COMPLIANCE**

Brian P. Fay hereby certifies that the Memorandum in Support is in compliance with Local Rule CR 47.2. The Memorandum's line spacing is double spaced (except quotations), and is proportionately spaced, with a 14 point font size and contains less than 6500 words. (Total number of words: 1180 excluding captions and certificates).

Respectfully submitted this 27<sup>th</sup> day of November, 2015.

ANGEL, COIL & BARTLETT

/s/ Brian P. Fay  
Brian P. Fay  
Attorney for Defendant